Supreme Court, U.S.
FILED
NOV 20 2001
OFFICE OF THE CLERK

No. 01-205

IN THE

Supreme Court of the United States

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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13 pp

STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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The Federal Circuit's decision, which has precedential effect nationwide, 28 U.S.C. § 1292(d)(4)(A), precludes any plaintiff challenging the constitutionality of a federal statute that creates ongoing financial obligations to the United States from seeking declaratory or injunctive relief in a federal district court. Rather, under the Federal Circuit decision, the only court with jurisdiction to hear such constitutional claims is the United States Court of Federal Claims ("CFC").

The Federal Circuit's decision upsets well-established jurisdictional rules. It conflicts squarely with *Eastern Enterprises Inc. v. Apfel*, 524 U.S. 498 (1998), in which this Court held that Fifth Amendment challenges to a federal revenue-generating statute should be brought in federal district court and not the CFC. It eviscerates *Bowen v. Massachusetts*, 487 U.S. 879 (1988), which reaffirmed the long-standing rule that actions asserting claims for prospective, equitable relief, as opposed to money damages, belong in the federal district court and not the CFC. In addition, the Federal Circuit's decision calls into question countless other decisions of this Court and the regional circuit courts of appeals in which similar constitutional challenges and claims for declaratory and injunctive relief were brought and decided in federal district courts, not the CFC. *See* Pet. 19-26. This Court's review is essential to restore certainty and prevent further needless litigation over the proper forum for constitutional challenges to federal revenue-generating statutes.

1. Respondents' Argument Is Factually Inaccurate.

Hard-pressed to defend the Federal Circuit's rationale, Respondents contend, in their Brief in Opposition, that the procedural background of this case justifies the Federal

Circuit's sweeping departure from controlling precedent. *See, e.g.*, Resp. Br. 2. However, even if the procedural posture of this case were relevant to the jurisdictional issues presented here — which it plainly is not — Respondents' argument fails because it is premised upon an inaccurate portrayal of the facts underlying this appeal.

Respondents contend that Petitioners' District Court action, when first commenced, was identical in all respects to the refund actions they previously brought in the CFC. This is the focus of Respondents' "Question Presented" (Resp. Br. (I)) and the thrust of their argument to the Court. *See* Resp. Br. 2 ("[t]his case concerns whether . . . petitioners, who . . . in fact have *already* sought judicial review of their claims in the [CFC], [can] bring the *same* claims . . . in district court . . ."); *id.* 4 (". . . petitioners filed this action in federal district court in New York, relying on the *same* constitutional and contractual claims they had asserted in support of their 'illegal exaction' suits in the [CFC]") (emphasis added). Respondents also insist that these procedural facts distinguish this case from *Eastern Enterprises*, *Bowen* and numerous conflicting circuit courts of appeals' precedent. *See, e.g.*, *id.* 10-11 ("none [of the conflicting precedent] involved litigants that had already brought suits for retrospective relief in the [CFC] and then . . . filed almost identical claims . . . in the district court"); *id.* 12 (arguing that *Bowen* should not apply "where, as here, the claimants were pursuing substantially the same claims [in the CFC] at the time they filed their [district court] suits"); *id.* 20-21 ("[no contrary authority] holds that litigants, such as petitioners, that have already filed due process actions in the [CFC] . . . may later bring the same claims in district court").

As Respondents well know, being a party to the District Court and CFC cases, Petitioners' Due Process and Takings Clause challenges to EPACT were *first* asserted in the District Court, *not* the CFC. Respondents entirely ignore the fact that Petitioners' CFC cases, when initially brought, were limited to breach of contract and just compensation claims and did not include "illegal exaction" or due process causes of action at all.[1] It was not until *after* this Court's decision in *Eastern Enterprises* and *after* commencement of the District Court action, that most (but not all) Petitioners amended their CFC complaints to include illegal exaction due process claims. Moreover, as Petitioners' CFC complaints clearly indicate, these amendments were made solely for the purpose of preserving Petitioners' right to refunds based on the constitutional theories being advanced in the District Court.[2] Respondent's suggestion, thus, that Petitioners' District Court action, when commenced, was nothing more than a carbon copy of Petitioners' then-pending CFC cases is seriously misleading.

In any event, the procedural background of this case has no bearing on the jurisdictional question presented here. *See* 28 U.S.C. §§ 1331, 1631; 5 U.S.C. § 702, *et seq.* Contrary to Respondents' assertion, neither *Eastern Enterprises* nor *Bowen* turns on the absence of an action in the CFC, and

1. Although some of Petitioners' CFC actions initially included a cause of action labeled "illegal exaction," those claims addressed EPACT's application to indirect purchasers of Respondents' uranium enrichment services and did not involve any constitutional challenge to the EPACT assessment scheme.

2. Respondents also conveniently ignore the fact that Petitioners sought to stay their CFC actions pending resolution of the District Court case, and that, with one exception, each of those actions is presently stayed. Pet. 4-5.

there is nothing in either decision to suggest that the presence of such a case would have led this Court to a different result.[3]

Moreover, the course of action Petitioners pursued — which was to file actions for refunds of past payments in the CFC and then to bring a separate action in the District Court challenging the validity of EPACT and seeking prospective, equitable relief from future payments — was entirely consistent with prevailing Federal Circuit precedent. *See Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994). As these cases teach, such an approach does not constitute forum-shopping, but is likely necessary to attain complete relief in light of the jurisdictional limitations of the two federal courts.[4] Respondents fail to explain why the Federal Circuit's rule does not apply with equal force here.[5]

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3. Respondents' suggestion that *Bowen* is also distinguishable because the CFC's jurisdiction in that case was uncertain, whereas here, it is entirely clear, simply does not bear scrutiny. In *Bowen*, the CFC's jurisdiction was doubtful because it could not provide the equitable relief sought. Here, it is undisputed that the CFC lacks jurisdiction to provide declaratory and injunctive relief and, contrary to Respondents' assertion, the CFC's power to render judgment on Petitioners' Due Process Clause claims is far from clear. *See infra* at 6; Pet. 19-26.

4. Indeed, as 5 U.S.C. § 706 makes clear, if there is any court capable of providing Petitioners with complete relief, it is the federal district court.

5. The Federal Circuit adopted this rule in *Loveladies Harbor* following this Court's decision in *Keene Corp. v. United States*, 508 U.S. 200 (1993). In *Keene*, this Court considered 28 U.S.C. § 1500, which precludes a plaintiff that first brings an action in the district court from later pursuing a claim in the CFC. Notably, the statute does not prohibit the reverse — first bringing an action in the CFC

(Cont'd)

2. APA Section 704 Is Inapplicable Here.

The Federal Circuit also reaches the remarkable conclusion it does here by completely distorting the letter and intent of Administrative Procedure Act ("APA") Section 704 (5 U.S.C. § 704).[6] Under the Court's novel and expansive reading of that statute, the standard for assessing whether the CFC (or any other court) can provide an "adequate remedy" and deprive the District Court of jurisdiction, has little to do with the remedy requested at all. Rather, as Respondents' submit, the question is whether or not the CFC can provide "adequate review." Resp. Br. 9-11. Under Respondents' approach, so long as the CFC has the power to hear the substantive issues raised it can provide an "adequate remedy." Respondents' strained reading of the statute lacks merit and their reliance on *Bowen* for this point is equally misplaced.[7]

(Cont'd)
and then commencing a separate action in the district court — the procedure adopted by Petitioners here. Moreover, although this Court in *Keene* did not directly rule upon the merits of Petitioners' approach, it did acknowledge the process. 508 U.S. at 209-16 n.4, 6, 9.

6. Respondents suggest that Petitioners believe a waiver of sovereign immunity under the APA is required for their constitutional challenges to EPACT. Resp. Br. 9. Respondents well know that Petitioners do not believe such a waiver is necessary as they have maintained in the courts below and in their petition here. *See* Pet. 17-18. As this Court's decision in *Eastern Enterprises* makes clear, the APA's waiver of sovereign immunity is not required where, as here, the constitutionality of government action is at issue. *See also United States v. Vasquez*, 145 F.3d 74 (2d Cir. 1998). Even if, however, an explicit waiver of sovereign immunity were required in this case, the APA surely provides one.

7. Respondents' quotes from *Bowen* on this point, Resp. Br. 2, 9-10, are completely out of context. As this Court in *Bowen* explained,
(Cont'd)

The Federal Circuit compounds its misreading of Section 704 by concluding that Petitioners' claims for prospective relief can be satisfied by application of the doctrine of *res judicata*. As Respondents, echoing the Federal Circuit, contend, if a CFC judgment awarding refunds in one action might have preclusive effect in a subsequent refund action, the CFC can provide an adequate remedy for injunctive relief. Resp. Br. 10. Thus, under the Federal Circuit's decision, Petitioners must continue to pay their yearly EPACT assessments and then sue Respondents each year for refunds. The only relief Petitioners might possibly get from this seemingly useless exercise depends entirely upon Respondents' willingness to refrain voluntarily from collecting future assessments. APA Section 704 does not dictate such an absurd result.[8]

(Cont'd)
the types of actions in which the Tucker Act typically provides an adequate remedy are those arising under federal statutes "that provide compensation for specific instances of past injuries or labors . . . [not] suits that [might] require the type of injunctive and declaratory powers that the districts courts can bring to bear . . .". *Bowen*, 487 U.S. at 900 n.31. *See also Bowen*, 487 U.S. at 904 ("litigation in the Claims Court can offer precisely the kind of 'special and adequate review procedures' that are needed *to remedy particular categories of past injuries or labors for which various federal statutes provide compensation*") (emphasis added). As *Bowen* makes clear, the Tucker Act is not such a statute.

8. Respondents' further argument that the CFC can provide an "adequate remedy" because Petitioners would not be entitled to an injunction is also irrelevant. A plaintiff's likelihood of success on the merits has never been the standard for judicial review under the APA, or the barometer by which a federal district court's jurisdiction is measured. *See also Bowen*, 487 U.S. at 907 n.43 ("[i]t is important
(Cont'd)

3. *Eastport*'s Dicta Is Inconsistent With This Court's Precedent.

Respondents dispute Petitioners' assertion that the CFC lacks jurisdiction to hear their due process challenges to EPACT by pointing to the language of the Tucker Act which gives that court power "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . .". 28 U.S.C. § 1491(a)(1). Resp. Br. 19-20. Respondents overlook, however, the clear admonition of this Court that no action against the United States may be maintained under the Tucker Act, unless the Constitutional provision, statute or regulation at issue "creates a substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Respondents here concede that the Due Process Clause does not create a substantive right to money damages, Resp. Br. 17-18, yet suggest that such a right can be derived from *dicta* in a 33-year old Court of Claims case. Resp. Br. 16-17, citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967). However, if, as Respondents and the Federal Circuit assert, the CFC has "long possessed jurisdiction to consider constitutional claims . . . under the 'illegal exaction' doctrine," Pet. App. 10a, it is quite remarkable that neither can point to a decision in which

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to remember that whether injunctive or declaratory relief is appropriate in a given case will not always be apparent at the outset"). Respondents' related contention that the District Court has already opined on the merits of Petitioners' injunction claims is particularly disingenuous. Resp. Br. at 14. Not only is the District Court's statement pure *dictum*, taken entirely out of context, but it was later rejected by the Second Circuit Court of Appeals. *See Consolidated Edison Co. of New York v. United States*, 213 F.3d 625 (2d Cir. 2000).

the court has exercised that power outside of recent cases involving EPACT.[9]

CONCLUSION

For the reasons set forth above and in their original petition, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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9. Even if, as a general matter, the CFC were empowered to hear due process claims that still would not be determinative here. As set forth above, the focus of Section 704 is on the adequacy of the remedy, not the substantive legal issues to be reviewed.